JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 448

SHELL OIL COMPANY,
Petitioner,

vs.

JAMES P. SULLIVAN and
HERMAN R. ENGBERSON,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. .....

SHELL OIL COMPANY,
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JAMES P. SULLIVAN and
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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled consolidated cases on June 20, 1956.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 522-534) is reported in 234 F. 2d 733. It is printed as appendix "A" to this petition, appendix page 1. The oral opinion of the District Court (R. 514-519) is unreported. It is printed as appendix "B" to this petition, appendix page 17.

JURISDICTION

The judgments of the Court of Appeals were entered on June 20, 1956 (R. 535-536). They are printed as appendix "C" to this petition, appendix pages 21, 22. Rehearing was denied on July 31, 1956 (R. 537). The jurisdiction of this court is invoked under 28 U.S. Code, Section 1254(1). That of the District Court was based on 28 U.S. Code, Section 1332(a)(1).

QUESTIONS PRESENTED

This case raises a question of California law. It is presented to a Federal court rather than a California court because respondents (plaintiffs below) chose to file their actions there (on the basis of the diverse citizenship of the parties) not because petitioner (defendant below) chose to remove them from a California court to a Federal court.

Petitioner is the owner of premises to which respondents came, as the employees of an independent contractor, to remedy a defective condition. Respondents were injured while remedying that condition. The question of California law is this: whether petitioner was under a duty to make the defective condition safe for respondents or to warn them of its existence.

Our position and that of the trial court was and is that petitioner was under no such duty. The Court of Appeals held that, under California law, petitioner was under such a duty.

The questions before this court are:

(1) Whether the Court of Appeals has decided a question of California law in a way in conflict with the applicable law of California?

(2) Whether the Court of Appeals was justified in refusing to follow controlling decisions of intermediate California appellate courts on the ground that the

Supreme Court of California would not follow them?

(3) Assuming that those decisions were not controlling and that the law of California can accordingly be said to be unsettled, whether, in determining how the Supreme Court of California would have decided this case, the Court of Appeals was justified in disregarding the cases from other jurisdictions which the Supreme Court of California would have followed and which all hold that the owner of premises is free from the liability which the Court of Appeals imposed upon petitioner in this case?

STATEMENT OF THE CASE

The accident out of which this case arose occurred on petitioner's premises while respondents were engaged as employees of an independent contractor, Southwest Welding and Manufacturing Company, in dismantling and repairing a steel tank owned by petitioner.*

The tank had been used for the storage of acid and, because of the corrosion incidental to that use, the center column inside the tank was in an extremely weakened condition. It was "corroded beyond repair" (R. 252) and had holes (through which a baseball or a golf ball could have been stuffed (R. 253)) approximately three to six feet from the ground (R. 252, 269, 273, 306). Petitioner admittedly knew about its weakened condition and about the holes (that is one of the reasons why the tank was being dismantled and *the* reason why the center column was being scrapped and replaced (R. 255)).

Respondent Sullivan was a boilermaker welder with 11 years of experience in tank work (R. 61, 92). Respondent

*Both cases are based on diversity of citizenship and were brought under 28 U.S. Code, Section 1332(a)(1).

Engberson, the foreman, had 12 or 13 years of such experience (R. 132).

Both were on the premises for the purpose of dismantling and repairing the tank (R. 100, 167), the job which their employer had contracted to perform. Both knew that some parts of the tank, including the center column, were to be scrapped, thrown away and replaced and that others were to be saved and used again (R. 100, 167).

They were injured as a result of the collapse of the center column while they were removing the roof of the tank.

Respondents took the position at the trial that they were justified in working on the roof and burning around its edge (so as to remove the support afforded the roof by the shell of the tank itself) without first ascertaining how much support was afforded the roof by the center column (R. 97, 98, 114, 121, 130). In other words, they took the position that they were entitled either to a strong and safe center column or to a warning *from petitioner* that the column was unsafe.

It was petitioner's position at the trial that both respondents knew that the center column was defective and could no longer adequately support the roof and that, in any event, under the applicable California law, petitioner was under no duty either to warn respondents of the defectiveness of the condition which they were to repair or to make that condition safe for them.

The District Court agreed with petitioner's position and directed a verdict in its favor at the close of all of the evidence (R. 15, 33). The Court of Appeals reversed the judgments.

Although the opinion of the Court of Appeals seems to imply that we did not, we conceded on appeal, as we did at the trial, that the center column was defective and that

petitioner knew it to be defective. That was the reason why petitioner was having it removed, scrapped and replaced.

For the purpose of the argument, and for that purpose only, we may also concede that the jury could have found that the defect was latent. Our basic contention is, however, that the question of whether it was latent or patent is completely immaterial and that the jury could *not* have been allowed to find that petitioner was negligent in not warning respondents of the danger for petitioner was under no duty to provide them with a safe tank on which to work and accordingly was under no duty to warn them.

Respondents take the position that they did not have to ascertain for themselves the condition of the tank which they were about to dismantle, scrap and repair; and that they were justified in assuming that the column was strong enough to support the roof until such time as someone told them that it was not.

Our position is that, even if their contention were sound, which it is not, the duty to warn respondents rested on their employer, the experienced tank dismantling and repairing organization to which petitioner entrusted the job, and not on petitioner. The fact that, if petitioner had been under a duty to warn respondents, it could not have delegated that duty to their employer has of course no bearing on the question of whether petitioner had such a duty.

Petitioner was interested only in having a tank that was out of condition put back in condition. It gave respondents' employer complete discretion as to how the work was to be done and every opportunity to determine for itself how best to do it, including the opportunity to inspect the tank as much as it felt that it should be inspected. This was no hurried job and respondents' employer took full advantage of that opportunity. Its plant superintendent inspected the tank *several months* before the accident (R. 352) and

thereafter its engineering department prepared a work order, a bill of materials and engineering drawings for the job (R. 354-6).*

Under the circumstances, it can only be held that such warning as was to be given respondents should have been given them by their employer.

REASONS FOR GRANTING THE WRIT

(1) The opinion of the Court of Appeals decides an important question of California law in a way in conflict with the applicable law of California. It refuses to follow controlling decisions of intermediate California appellate courts even though there is every indication that the Supreme Court of California would follow them.

Respondents were on petitioner's premises for the express purpose of repairing a defective condition. They cannot recover damages from petitioner for injuries which they sustained as a result of that condition and while they were engaged in repairing it.

None of the California cases upon which the Court of Appeals relies holds that the owner of premises is under a duty to warn the employee of an independent contractor in such a case. In fact, all of the California cases which bear on this issue indicate that the owner is under no such duty.

The Court of Appeals treats this case as it would the ordinary case of an invitee injured by a defective condition

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*Much is made in the opinion of the Court of Appeals of the fact that petitioner's inspectors used special instruments and techniques to determine the degree of corrosion of the tank. Petitioner used such instruments and techniques because it was interested in establishing an exact corrosion rate which would enable it to determine the eventual retirement date of the tank (R. 263) and also because the thickness of a wall, for example, cannot be ascertained without them since it is impossible for one person to look at both sides of a tank at the same time. In this case, however, we are concerned only with the corrosion of the center column *at the time of the accident*. No instruments were needed at that time to ascertain that the center column had holes the size of a baseball or a golf ball (R. 278, 314, 453).

of the premises. For example, it relies on *Blumberg v. M. & T. Incorporated,* 34 Cal. 2d 226, 209 P.2d 1, a case in which the plaintiff fell because of the defective condition of a floor mat in the defendant's office building. The plaintiff had gone there to visit a tenant, not to repair the mat which caused her to fall. As to her, the general rule upon which the Court of Appeals relies obviously applied. But that does not mean that it should apply in this case.

Nor is this the standard case of a workman injured by a defective condition in no way connected with the work which he was to do on the premises and to whom the owner can accordingly be said to have failed to give a safe place to work. It is the case of an experienced tank dismantling and repairing crew hired for the express purpose of dismantling, scrapping and repairing a defective and unsafe tank and injured by the very condition which they were hired to repair.

As shown by the leading California case on the subject, *Nagle v. City of Long Beach,* 113 Cal. App. 2d 669, 248 P. 2d 536, the rules applicable to such a case are altogether unlike the rules relied upon by the Court of Appeals.

The plaintiff in that case was an employee of an independent contractor hired by the defendant to repair a gas tank. His job was to strengthen the interior wooden framework. He fell to the bottom of the tank when a crossbar gave way on the ladder which he was climbing.

The court affirmed a judgment of nonsuit, holding that a person who is invited to a structure undergoing repairs or in the course of construction takes that structure as he finds it. At page 672 of 113 Cal. App. 2d, the court stated:*

> "Appellant was upon respondent's property as part of a labor group specifically brought there for the

*The entire opinion in the Nagle case is printed as appendix "D" to this petition, appendix page 23.

purpose of strengthening and refurbishing a wooden structure within the gas reservoir. He was a skilled craftsman employed to assist in remedying the grossly defective conditions which contributed to his injuries. The very nature of his employment was itself warning of the dangers to be encountered."

To the same effect, although involving construction rather than repair projects, see *Kolburn v. P. J. Walker Co.*, 38 Cal. App. 2d 545, 101 P.2d 747 (hearing denied by the Supreme Court of California); *Mitchell v. A. J. Bayer Co.*, 126 Cal. App. 2d 501, 504, 272 P.2d 870; *Irvine v. J. F. Shea Co., Inc.*, 41 Cal. App. 2d 458, 460, 107 P.2d 80; *Ambrose v. Allen*, 113 Cal. App. 107, 113, 289 Pac. 169.

It is true that, as pointed out by the Court of Appeals, in none of the cases dealing generally with the duty of the owner of premises to a business invitee, did the Supreme Court of California refer to the rule upon which we rely in this case.

But the reason is simply that the court was never faced with the problem involved in this case and that it accordingly never had the opportunity to apply that rule.

In fact, in *McDonald v. Shell Oil Co.*, 44 Cal. 2d 785, 285 P.2d 902, the latest comprehensive restatement by the Supreme Court of California of the rules applicable to the owner's liability for injuries sustained by the employee of an independent contractor, the court did recognize that rule, albeit indirectly. In affirming a judgment of nonsuit and holding that the employee of an independent contractor injured by defective equipment supplied by his employer could not recover damages from the owner of the premises, the court described as follows the situations in which the owner may be held liable: injuries resulting from a condition of the premises "over which the owner remained in

control" (44 Cal. 2d at 791), injuries caused by defective equipment furnished by the owner and injuries occurring while the owner actively interfered with or assumed to direct the performance of the work.*

In this case, petitioner neither furnished the equipment with which respondents were working nor did it interfere with or assume to direct the performance of their work. Thus, it is only if their injuries were caused by a condition of the premises *over which it remained in control* that it could be held liable. They were not caused by such a condition.

In none of the California cases upon which the Court of Appeals relies were the plaintiff's injuries caused by a defective condition which he was employed to repair.

For example, in *Austin v. Riverside Portland Cement Co.*, 44 Cal. 2d 225, 282 P.2d 69, the plaintiffs were injured *not* by a defect in the rock crusher which they were repairing on the defendant's premises but by a condition which had nothing to do with the crusher (a crane which they were using came in contact with an overhead power line). The court held that the defendant should have made the power line safe for the plaintiffs. In this case, however, petitioner could not have made the center column safe for respondents. If it had been safe, they would not have been on the job in the first place.

In *Hinds v. Wheadon*, 19 Cal. 2d 458, 121 P.2d 724, the plaintiff was injured as a result of the defendant's failure to do something *which he had undertaken to do* under the terms of his contract with the plaintiff's employer (keep a tank full of water while the plaintiff was doing some welding in order to protect him from the possibility of an explo-

*The pertinent part of the opinion in *McDonald v. Shell Oil Co.*, supra, is printed as appendix "E" to this petition, appendix page 27.

sion). In this case, the accident was *not* caused by petitioner's failure to do something which it had undertaken to do. Petitioner did not undertake to do anything about the tank or the center column. On the contrary, it turned over the dismantling and repairing job completely to respondent's employer, an organization far more qualified than petitioner to do that job.

In *Dobbie v. Pacific Gas & Electric Co.*, 95 Cal. App. 781, 273 Pac. 630, the plaintiff fell through a concealed skylight while working on the roof of the defendant's building. The crucial distinction is of course the fact that he was not working on the skylight. He just happened to fall through it. His work would have been safe had there been no defective condition on the roof. In this case, however, had the tank been safe, respondents would have had no work to do.

Raber v. Tumin, 36 Cal. 2d 654, 226 P.2d 574; *Pauly v. King*, 44 Cal. 2d 649, 284 P.2d 487; *Emery v. Pacific T. & T. Co.*, 43 Cal. App. 2d 402, 110 P.2d 1079; *Bazzoli v. Nance's Sanitarium, Inc.*, 109 Cal. App. 2d 232, 240 P.2d 672, are all similarly distinguishable. In none of those cases, was the plaintiff injured by the defective condition which had brought him upon the premises and which it was his job to remedy.

If, as the Court of Appeals begrudgingly recognizes, the employee of an independent contractor hired to repair defective wiring would be precluded from recovering damages for injuries sustained from an electric shock, it should follow that the employee of an independent contractor hired to dismantle a tank is precluded from recovering for injuries such as were sustained by respondents in this case. We agree that respondents were not bound as a matter of law to discover *every defect* which they might encounter on the premises. This, however, was not just any defect. It was a defect in the very part of the premises which they were to dismantle *because it was defective*.

We may concede for the purpose of this argument that a "defective" center column could conceivably still provide adequate support for the roof. The question remains, however, as to whether the duty rested on petitioner to warn respondents (who knew that it was defective and had to be scrapped and replaced) that it was defective in such a way as not to be able to support the roof.

It is our earnest contention that petitioner was under no such duty.

(2) Even if the law of California can be said to be unsettled, there is no indication that the Supreme Court of California would have ruled as the Court of Appeals did. On the contrary, there is every indication that it would have followed the overwhelming weight of authority and would have affirmed the judgments of the trial court.

The Court of Appeals recognizes that it is bound by decisions of intermediate California appellate courts unless there is persuasive evidence that the Supreme Court of California would rule otherwise.

As we have demonstrated in this petition and as we thought that we had demonstrated to the Court of Appeals, the cases which appear to that court to provide such persuasive evidence are altogether distinguishable.

Under the circumstances, the Court of Appeals should have followed the rule of *Nagle v. City of Long Beach*, supra, which is certainly the closest and most persuasive California authority on the subject.

The fact that it and the other California cases which the Court of Appeasl refuses to follow were never cited by the Supreme Court of California is of no significance since that court never had occasion to cite them.*

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*In the only one of those cases in which a hearing was sought in the Supreme Court of California (*Kolburn v. P. J. Walker Co.*, supra), a hearing was denied (38 Cal. App. 2d at 550). Moreover, *Irvine v. J. F. Shea Company, Inc.*, supra, *was* cited in *Crane v. Smith*, 23 Cal. 2d 288, 300, 144 P.2d 356.

Moreover, it should be emphasized that, as recently as January 11, 1956, yet another intermediate California appellate court restated the rule applicable to construction cases which the Court of Appeals refused to follow. In *Allen v. Jim Ruby Construction Co.*, 138 Cal. App. 2d 428, 291 P.2d 991, the court declared at page 434:

> "Another [well settled principle] is that one who enters an uncompleted building takes the risk of using the premises in the condition in which he finds them (*Mitchell v. A. J. Bayer Co.*, 126 Cal. App. 2d 501 (272 P.2d 870); *Kolburn v. P. J. Walker Co.*, 38 Cal. App. 2d 545, 549 (101 P.2d 747); *Irvine v. J. F. Shea Co., Inc.*, 41 Cal. App. 2d 458, 460 (107 P.2d 80); *Nagle v. City of Long Beach*, 113 Cal. App. 2d 669, 671 (248 P.2d 799); *Ambrose v. Allen*, 113 Cal. App. 107, 113 (289 P. 169).)"

A petition for a hearing filed in that case was denied by the Supreme Court of California (138 Cal. App. 2d at 434).

On June 27, 1956, the rule was again restated in *Atherley v. MacDonald, Young & Nelson*, 142 A.C.A. 652, 657, 298 P.2d 700, and the Supreme Court of California again denied a hearing. (See page 1 of the minutes of the Supreme Court of California in the August 28, 1956, issue of 47 Advance California Reports.)

Under the circumstances, it certainly cannot be said that there is persuasive evidence that the Supreme Court of California would not adopt the rule of the Nagle case.

Moreover, there is one thing which the Supreme Court of California would have done before deciding this case and which the Court of Appeals completely failed, in fact, refused to do.

If the point is unsettled, the Supreme Court of California not only would have considered cases from other jurisdictions, but, having considered them, would have followed

the weight of authority.* The Court of Appeals, however, refused to consider such cases even though it was aware of the comprehensive and very recent annotation on the subject contained in 31 A.L.R. 2d 1375 and even though the cases which are cited in that annotation overwhelmingly support petitioner's position in this case.

Before it could decide what the Supreme Court of California would or would not have done in this case, it certainly was incumbent upon the Court of Appeals to consider all of the cases which the Supreme Court would have considered under similar circumstances. In fact, it was imperative that the Court of Appeals consider *and follow* them.

The leading case on the subject is *Hammond v. El Dorado Springs* (1951), 362 Mo. 530, 242 S.W. 2d 479, 31 A.L.R. 2d 1367. The plaintiff in that case was an employee of an independent contractor hired to "repair, alter and improve" a water tower owned by the defendant. He was injured while working inside the tower when certain rusty and corroded iron rods broke loose.

In affirming a judgment on the pleadings in favor of the defendant, the court pointed out that the very work which the plaintiff's employer was required to do presupposed that the tower was in a defective condition. The court held that the responsibility for finding out what, if anything, was

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*For recent examples of that court's reliance upon cases from other jurisdictions, see the following: *Buckley v. Chadwick*, 45 Cal. 2d 183, 199, 289 P.2d 242; *Eilke v. Rice*, 45 Cal. 2d 66, 72, 286 P. 2d 349; *Roman Cath. etc. Corp. v. City of Piedmont*, 45 Cal. 2d 325, 330-332, 289 P.2d 438; *Vogel v. Thrifty Drug Co.*, 43 Cal. 2d 184, 188, 272 P.2d 1; *Ransom v. Penn. Mutual Life Ins. Co.*, 43 Cal. 2d 420, 423-424, 274 P.2d 633; *DeBurgh v. DeBurgh*, 39 Cal. 2d 858, 869-870, 250 P.2d 598; *Bacich v. Board of Control*, 23 Cal. 2d 343, 352-353, 144 P.2d 818. The Supreme Court of California could not do otherwise since the common law *is* the law of California (see Section 22.2 of the Civil Code of California).

defective rested on the plaintiff's employer and that the defendant had no duty to warn the plaintiff.*

The court distinguished an earlier case in which the employee of an independent contractor hired to paint a building was allowed to recover for injuries sustained when a window sash gave way. The court pointed out that, in that case, the contractor had not been hired to repair the window. His work was limited to painting the building.

Similarly, recovery was denied as a matter of law in *Kowalsky v. Conreco Co.*, (1934) 264 N.Y. 125, 190 N.E. 206, a case in which the plaintiff, an employee of a subcontractor engaged to repair the shutter bars on the windows of the defendant's building, was injured when one of those bars gave way. Quoting from an earlier case, the court stated that it would be "manifestly absurd" to hold the owner liable under such circumstances.

To the same effect, see the very recent decision of the Court of Appeals for the Fourth Circuit in *Whitlow v. Seabord Air Line Railroad Company* (1955), 222 F.2d 57 as well as the many cases cited in the annotation in 31 A.L.R. 2d 1375, all of which make it clear that petitioner was under no duty in this case to warn respondents of the condition of the tank.

The same rule is followed in Admiralty cases. A shipowner does *not* warrant the seaworthiness of an unsafe condition aboard his ship to an independent contractor who was hired to make it safe (*Byars v. Moore-McCormack Lines* (C.C.A. 2), 155 F.2d 587; *Bruszewski v. Isthmian S.S. Co.* (U.S. D.C., E.D. Pa.), 66 F. Supp. 210, affirmed in *Bruszewski v. Isthmian S.S. Co.* (C.C.A. 3), 163 F.2d 720, certiorari denied 333 U.S. 828; *Laffoon v. United States* (U.S. D.C., S.D. N.Y.), 101 F. Supp. 823.)

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*Extensive excerpts from the opinion in *Hammond v. El Dorado Springs*, supra, are printed as appendix "F" to this petition, appendix page 28.

The Supreme Court of California would have followed those cases. Hence, it was incumbent upon the Court of Appeals to follow them too.

CONCLUSION

The duty to warn stems from the duty to provide a safe place to work. Petitioner could be said to have failed to provide such a place had respondents fallen into some concealed hole adjoining the tank. Petitioner was under no duty, however, to provide them with a safe tank to dismantle, scrap and repair.

In fact, had the tank been safe, respondents would have had no work to do on the premises.

Since their employer was hired to remove a corroded, weakened and unsafe center column, it cannot be contended that petitioner was supposed to provide respondents with a safe and strong center column. Since it was under no duty to make the column safe for them, petitioner was under no duty to warn them of its condition.

To us, the law of California is clear even though the Supreme Court of California may not yet have unequivocally spoken on the subject. If the Court of Appeals deemed it to be unsettled, however, it should have decided this case as the Supreme Court of California would decide it: it should have considered, instead of refusing to consider, the cases from other jurisdictions which the Supreme Court of California would consider and should have followed, instead of refusing to follow, the overwhelming weight of authority.

As its opinion now stands, the Court of Appeals can truly be said to have decided an important state question in a way in conflict with the applicable state law (Rule 19(1)(b) of the rules of this court).

We realize that it is only seldom that this court will grant certiorari to review a question of state law. It need hardly be emphasized that, in our days of specialization and of increased and increasing employment of experts to do jobs which call for experts, the question raised in this case is one of importance. It may be noted, however, that it was not petitioner that chose to bring it before a Federal rather than a California court. Hence, if the decision of the Court of Appeals is as erroneous as we believe that we demonstrated it to be, this court should be far less reluctant to issue the writ than it otherwise might be.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
for the Ninth Circuit

JAMES P. SULLIVAN, *Appellant,* vs. SHELL OIL COMPANY, *Appellee.*	No. 14,570
HERMAN R. ENGBERSON, *Appellant,* vs. SHELL OIL COMPANY, *Appellee.*	No. 14,571

June 20, 1956

Appeals from the United States District Court for the Northern District of California, Southern Division.

Before: HEALY and BONE, Circuit Judges, and CARTER, James M., District Judge

CARTER, James M., District Judge.

OPINION

This appeal raises the question of the duty of an owner-occupier of premises to the employees of an independent contractor engaged in dismantling a tank on the premises. The action is one to recover damages for personal injuries sustained when the center column of one of defendant's

storage tanks on which plaintiffs were working, collapsed.

The question is here on appeal by plaintiffs, Sullivan and Engberson, from a directed verdict and judgment in favor of defendant, Shell. Jurisdiction of the District Court was based on diversity of citizenship.

Upon appeal from a judgment of dismissal entered upon the close of all the evidence, the appellant is entitled to the benefit of every inference which can reasonably be drawn from the evidence viewed in the light most favorable to the cause of action asserted. *Gunning v. Cooley*, [1930] 281 U.S. 90, 94; *Schnee v. Southern Pacific Co.* [9 Cir. 1951] 186 F.2d 745, 746; *Graham v. Atchison T. & S. F. Ry. Co.* [9 Cir. 1949] 176 F.2d 819, 823; *Kingston v. McGrath* [9 Cir. 1956] ..... F.2d .....

Viewing the evidence in such light, the record discloses the following: Plaintiffs were employees of Southwest Welding & Manufacturing Company, hereafter referred to as Southwest. Southwest, in 1952, contracted with the defendant, Shell, to dismantle and rebuild a number of storage tanks including Tank 1006, a steel tank 24 feet high and 24 feet in diameter.

The center column, the main support for the roof, consisted of six inch channel backed by four inch channel. The column was anchored at the bottom of the tank, and welded at the top to a circular piece of metal, 24 inches in diameter, called the "dollar plate." Twelve rafters were bolted to the dollar plate at one end, and, spreading out like the spokes of a wheel, were welded to clips on the inside of the shell of the tank at the other end. The steel roof was welded to the sides or shell of the tank. The roof thus was supported by the center column, the rafters and the sides of the tank.

Tank 1006 was put in service by Shell in May of 1951 and used for the storage of hydro-carbons and sulphuric acid.

In January 1952 the tank was inspected by Shell. The inspection, conducted by Shell employees, was made in order to establish the corrosive rate of the metal, thereby enabling Shell to determine the approximate retirement date of the tank. Following the inspection, it was concluded that the tank should be taken out of service in August of 1952. A further inspection in August of 1952 by Shell, revealed that the metal was extremely corroded and in places the center column was corroded through, leaving holes the size of baseballs or golf balls. The tank was then withdrawn from service and bids let for dismantling and rebuilding.

The customary procedure in dismantling such a tank is as follows: The roof of the tank is cut in half with acetylene torches; then the workers burn around the shell of the tank where the roof joins the shell; next the halves are themselves cut in half and lift pads are welded onto each quarter and removed by crane. At the start of the operation a hole is burnt in the center of the roof to allow fumes to escape. This exposes the dollar plate with the rafters resting on top of the dollar plate and bolted thereto.

While there is still some roof there to work on, the heads of the bolts that hold the inside edge of the rafter to the dollar plate are burnt off. The bolt itself does not drop through. Pressure keeps the bolt in place, holding the rafter to the dollar plate. Following the complete removal of the roof the rafters are removed one by one by burning the clip off at the outside edge of the rafter, and the rafter is then hit up or down, or jiggled to drop the bolts, and then removed.

Following this, the center column is taken out by wrapping a sling around it. Lastly, the outside shell itself is removed by burning off portions of the plate, piece by piece. With everything moving smoothly, a tank such as that Tank 1006 could be dismantled in one day.

On the particular day in question, the following work had been done. The hole was cut in the center of the roof, half of the roof had already been removed and the other half had been burnt almost all the way around the outside edge. The heads of the bolts that connected the rafters to the center column had been burnt off. Sullivan was starting to burn the remaining half into quarters when Engberson came up on top of the roof. It was at this time that the center column collapsed, resulting in the injuries to the appellants.

As to appellants' knowledge, if any, of the defective column, the record shows: Both appellants were experienced in the field of repairing, dismantling and constructing tanks, Sullivan having performed this work for eleven years and Engberson for twelve or thirteen.

Sullivan testified that prior to the accident no one from Shell had talked to him about the tank; that he knew nothing of its prior condition, or what its contents had been; that he had no knowledge of the condition of the center column and that although he knew the center column was to be scrapped, and the top, bottom, and rafters saved for rebuilding, this meant nothing to him insofar as the condition of the center column as a support member was concerned; that there were two open manholes at the bottom of the tank, but he did not look inside, nor make any examination of the center column; that it was not his job to inspect the center column; that he had not investigated because "we start work on a tank, the tank is supposed to be O.K. to go on, reasonably safe to go on, and furthermore, we aren't inspectors, we aren't qualified as inspectors to go in and inspect the tank. It is supposed to be done by men that are qualified and if it is safe or not safe to tell us about it."

Engberson testified that he was never at the tank with anybody from Shell to make an inspection of the tank; that he talked with Mr. Slobodnick of Shell as to what fittings he wanted saved; that Cady of Southwest gave him the work order the day before the accident; that he knew that the top, bottom and rafters of the tank were to be reused in rebuilding the tank; that he had been inside the tank for about ten minutes with Cady on a date two or three days before the accident happened and that from what he could see everything looked all right; that it was fairly dark inside the tank and one could not see very well; one could not see the top six or eight feet of the center column; that Cady asked him how much of the column he wanted to save; that he replied that as long as part was going to be scrapped, they might as well scrap all of it; that no one at Southwest told him anything about the center column and that he never saw any of Shell's inspection reports; that he only had the work order in his possession; that he had heard this was an acid tank; that instructions to scrap a center column did not mean to him that the center column was no good insofar as support was concerned.

Beck, Plant Superintendent of Southwest had looked in the manhole before the accident and when asked if he saw anything unusual, answered, "Nothing except it was dark." Steele, another worker on the job testified he could not tell before the accident, even with half the roof cut off, that the center column was in bad shape; that the tank looked good all over to him; that after the accident, inspection of the center column showed it was thin, about an eighth of an inch in thickness; that when the column buckled, "she just spread out like a gopher snake."

There was evidence from Shell inspectors and engineers that even a trained man could not tell whether metal is good

or not with the naked eye; that special instruments and techniques are required for inspections, a C-clamp, a micrometer, and audigage and a ballpeen hammer. Trent, a Shell inspector, testified one could not see or visualize a thinning of the metal, that it would take a clamp; that one could see the edges have thinned from the original thickness, but one could not visualize how thick or how thin they were; that he could not determine by merely looking at the metal whether it was sound or unsound, that was why he carried instruments.

The trial court reserved ruling on the motion for a directed verdict at the close of appellants' case. (Rule 50, F.R.C.P.) At the close of the evidence on both sides he granted the motion. In so doing and in entering judgment for Shell, the trial court held that Shell owed no duty to the plaintiffs insofar as their injuries were caused by conditions which the contractor was employed to remedy.

It is appellants' contention that the court erred in directing a verdict for Shell and entering judgment thereon; that Shell owed to them the duty to maintain its premises in safe condition, i.e. to furnish them a safe place in which to work; that such duty was not fulfilled and as a result thereof they sustained the injuries of which they now complain.

There can be no argument that the jury would have been entitled to find that the *center column was in fact defective*, since the accident itself is evidence thereof. *Paxton v. County of Alameda* [1953] 119 Cal. App. 2d 393, 408. There was ample testimony in the record as well for the jury to arrive at this conclusion.

Clearly, the jury could have found that Shell had *knowledge* of the defective column. Webb, a Shell engineer, gave his opinion that the central column of the tank was corroded beyond the point where it could be considered a safe structural member.

There is a dispute as to whether Southwest had such knowledge, but the jury might find they did not. Even if Southwest had such knowledge, that knowledge would not be *imputed* to Southwest's employees Sullivan and Engberson. In a case extensively cited by the California Supreme Court on other points, the court said, ". . . the contractor's knowledge or notice to him of the danger is not imputable to his employees who are invitees," *Dobbie v. Pacific Gas & Electric Company* [1928] 95 Cal. App. 781, 790. *Raich v. Aldon Construction Co.* [1954] 129 Cal. App. 2d 278 is impliedly authority for the same proposition. Miller the contractor, employing Raich the injured party, had knowledge of a hidden gasoline line. (p. 281). This knowledge was not imputed to Raich and recovery was permitted against the general contractor.

Thus from the record the jury could have found that the defect was latent, not obvious, and was known to Shell, but that the appellants did not know of the defect. From these facts they could have found negligence on the part of Shell in failing to warn these invitees of the hidden danger.

The trial court took the case from the jury, not on the basis that such findings might not have been made but on the basis of *Nagle v. City of Long Beach* [1952] 113 C.A. 2d 669, considered hereafter, and held that the question was one of law. The trial court termed the legal question involved "a close one."

In a diversity action, as here, the district court sits as "another court of the state," *Guaranty Trust Co. v. York* [1945] 326 U.S. 99, 108. This case is controlled by principles of California law.

The general rule in California is, that as to business guests or invitees, the owner-occupier is "obliged to exercise ordinary care to keep the premises in a reasonably safe

condition, or to warn . . . of danger." The duty is "not limited to conditions actually known . . . to be dangerous," but extends also "to conditions which might have been found dangerous by the exercise of reasonable care," *Blumberg v. M. & T. Incorporated* [1949] 34 Cal. 2d 226, 229; *Raber v. Tumin* [1951] 36 Cal. 2d 654, 658; *Bazzoli v. Nance's Sanitarium Inc.* [1952] 109 Cal. 2d 232, 236.

Employees of an independent contractor injured in the performance of a contract between their employer and the owner, are on the premises by the owner's invitation express or implied, and the owner owes a duty to warn against hidden dangers of which he knows or reasonably ought to know and of which they are unaware, *Dobbie v. Pacific Gas & Electric Company* (supra); *Buckingham v. San Joaquin Cotton Oil Co.* [1932] 128 C.A. 2d 94; and the owner-occupier owes to them the duty to furnish them a safe place in which to work. More accurately stated, the owner-occupier must "use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils," *Pauly v. King* [1955] 44 C.2d 649, 653; *Crane v. Smith* [1943] 23 C.2d 288, 296; *Austin v. Riverside Portland Cement Co.* [1955] 44 C.2d 225, 233.[1]

But the owner-occupier is not liable when the injuries result from a danger obvious to the injured party. The *obvious danger* rule has been stated by the Supreme Court of California as follows:

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[1]Two subsequent cases in the Supreme Court, referred to in appellee's supplemental brief, are not in conflict with this rule. In *McDonald v. Shell Oil Co.*, [1955] 44 C.2d 785, judgment for nonsuit as to the owner was affirmed, where the injury to the employee resulted from defective equipment, supplied and operated by the contractor-employer. In *Snyder v. So. Calif. Edison Co.*, [1955] 44 C.2d 793, judgment for defendant was reversed for failure to properly instruct the jury as to the defendant's duty as a public utility under statute and rules, to properly set a pole. Reference to the owner's common law duty is made at p. 803.

". . . If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger." *Shanley v. American Olive Co.* [1921] 185 Cal. 552, 555; *Hinds v. Wheadon* [1942] 19 Cal. 2d 458, 460, reversing a judgment for a nonsuit; *Brown v. Board of Trustees* [1919] 41 Cal. App. 100, 107. "But such owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. He is not required to give to the invitee notice or warning of an obvious danger. (29 Cyc. 471, 474; 26 Cyc. 1213) . . ."; *Shanley v. American Olive Co.* (supra), p. 555.

The *Shanley* case has been repeatedly cited by the California Supreme Court.

As to the duty of the employee on premises to discover dangers, the courts have said:

". . . 'The employee is not required to use any degree of care or diligence to discover defects. He will be held to have assumed the risk only when he knew, and will be held to have known when the defect was so obvious that he must have known or simply refused to open his eyes and see, or when he was put upon inquiry by some discovery or suggestion of danger which it was gross carelessness for him to neglect . . .' This principle is as applicable to an invitee, as was plaintiff, as to that of an employee," *Emery v. The Pacific Telephone & Telegraph Company* [1941] 43 C.A. 2d 402 at 409-410. Accord: *Moran v. Zenith Oil Co.* [1949] 92 Cal. App. 2d 236, 243; *Billeter v. Rhodes and Jamison Ltd.* [1951] 104 Cal. App. 2d 137, 144.

The rule on assumption of risk as compared to contributory negligence, was recently stated by the California Supreme Court and is pertinent here. "The defenses of

assumption of risk and contributory negligence are based on different theories. Contributory negligence arises from a lack of due care. The defense of assumption of risk, on the other hand, will negative liability regardless of the fact that plaintiff may have acted with due care. (See Prosser on Torts [1941], p. 277.) It is available when there has been a voluntary acceptance of a risk and such acceptance, whether express or implied, has been made with knowledge and appreciation of the risk. (See Rest. Torts, § 893.) Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of the risk, but where it merely appears that he should or could have discovered the danger by the exrcise of ordinary care, the defense is contributory negligence and not assumption of risk. (Hayes v. Richfield Oil Corp., 38 Cal. 2d 375, 385.) See Prosser on Torts [1941], p. 386," *Prescott v. Ralphs Grocery Co.* [1954] 42 Cal. 2d 158, 161-162 (265 P.2d 904); *Austin v. Riverside Portland Cement Company* [1955] 44 C.2d 225 at 235.

" 'The fact that one voluntarily assumes a certain degree of risk is not conclusive of negligence.' " *DeGraf v. Anglo California Nat. Bank* [1939] 14 C.2d 87, 100. ". . . But before it can be said that one has 'assumed the risk' of a specific hazard, it must be shown that he had knowledge of the condition creating the hazard," *DeGraf v. Anglo California Nat. Bank* (supra, p. 100); *Hayes v. Richfield Oil Corp.* [1952] 38 C.2d 375, 385.

It is hornbook law that, ordinarily, questions of negligence, contributory negligence and assumption of risk are questions of fact for the jury, *Callahan v. Gray* [1955] 44 C.2d 107, 111. It is only where "no other reasonable conclusion is legally deductible from the evidence," *Raber v.*

Tumin [1951] 36 Cal. 2d 654, 656, that the question becomes one of law, authorizing the trial court to grant a nonsuit (under California procedure) or a motion for directed verdict (federal procedure).

"The question of knowledge and appreciation of danger or the lack thereof . . . is ordinarily one to be determined by the jury from the facts of the case," *DeGraf v. Anglo California Nat. Bank* (supra, p. 100). ". . . Negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence," *McBride v. A. T. and S. F. Ry. Co.* [1955] 44 Cal. 2d 113, 119. "A defendant's conduct must always be gauged in relation to all the other material circumstances surrounding it, and if such other circumstances admit of a reasonable doubt as to whether such questioned conduct falls within or without the bounds of ordinary care then such doubt must be resolved as a matter of fact, rather than of law," *Seneris v. Haas* [1955] 45 C.2d 811, 823.

The intermediate tribunals of California have purported to say that in a certain class of owner-occupier cases, involving construction of buildings, the question of negligence, contributory negligence and assumption of risk become, ipso facto, a question of law. They would thus make an exception to the general rule of owner-occupier liability. These cases state:

> "The rule is established in California that an invitee to an uncompleted building in process of construction is invited to use such building in its then condition," *Kolburn v. P. J. Walker Co.* [1940] 38 Cal. App. 2d 545, 549; *Mitchell v. A. J. Bayer Co.* [1954] 126 Cal. App. 2d 501; *Irvine v. J. F. Shea Co.* [1940] 41 Cal. App. 2d 458, citing *Kolburn* (supra), and hold that the question

is one of law. These cases affirmed judgments of nonsuit or judgments on the pleadings.[2]

But *Austin v. Riverside Portland Cement Company* [1955] 44 Cal. 2d 225 and *Pauly v. King* [1955] 44 Cal. 2d 649 both involved construction projects and in neither of them are the above cases or the claimed exception to the general rule, cited by the Supreme Court of California. Nor have the above appellate cases been cited elsewhere with approval by the Supreme Court of California for such exception.

Nagle v. City of Long Beach (supra), relied on by the trial court, presents a possible further exception by an intermediate state tribunal. There an employee of a contractor engaged in repairing a gas tank was injured when a ladder gave way. Nagle was on city property "as part of a labor group specifically brought there for the purpose of strengthening and refurbishing a wooden structure within the gas reservoir. He was . . . employed to assist in remedying the grossly defective conditions which contributed to his injuries. The very nature of his employment was itself warning of the danger to be encountered," (p. 672). An alternate ground of holding was that there was no proof of the nature of the defective condition of the ladder. "When such proof is lacking there can be no finding that a reasonable inspection by respondent (owner) would have discovered the alleged danger," (p. 672). Judgment of nonsuit was affirmed.[3]

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[2]The leading intermediate appellate case underlying, and relied on by these authorities, detracts from their force, *Ambrose v. Allen*, [1931] 113 Cal. App. 107, does not *hold* that the question is one of law. It affirmed a judgment based on a jury verdict where proper instructions had been given. It stated, "This court may not hold as a matter of law that the facts contained in the record do not support the verdict of the jury . . .". (p. 112.)

[3]It can be argued that the second ground is the holding of the case since there were not facts showing notice to the owner-occupier. In such event the first ground stated would be only dictum.

Other California cases from the intermediate tribunals do not hold that an invitee repairing part of a structure, cannot under any circumstances, recover for injuries caused by any defect. Instead, the fact an invitee was present for the making of repairs did not bar him recovering in *Bazzoli v. Nance's Sanitarium, Inc.* (supra), where the defect was one which the invitee would not expect to encounter in his work. In *Dobbie v. Pacific Gas & Electric Co.* (supra), an invitee who was on the premises to make repairs had recovery for injuries received as a result of a defective skylight on the roof which had been permitted to become obscured by soot. This was not the type of defect which one present to repair some other part of the building would expect to encounter. *Emery v. Pacific Telephone & Telegraph Co.* [1941] 43 C.A. 2d 402, 110 P.2d 1079, allowed recovery to an invitee who was on a pole reattaching some power lines, the insulators of which had been repaired, for injuries which he received when he was thrown to the ground by a rotted pole base which reasonable care and inspection by the owner would have disclosed. *Hinds v. Wheaton* (supra) reversed a judgment for nonsuit where a welder was repairing tanks by welding brackets on the outside and received injuries when the heat of the welding exploded gas on the inside which would not have been there if the owner had kept the tank full of water.

Shell would have this court go a step further, and, based on *Nagle v. City of Long Beach* (supra), hold that California law provides that employees of an independent contractor such as Sullivan and Engberson, sent upon the premises to *dismantle* a tank, were *as a matter of law* not entitled to recover for injuries resulting from the defective center column.

We see from the foregoing that the obvious defect which a plaintiff saw or knew of, is contrasted with the latent or unobvious defect, which the plaintiff did not know of and was not required to discover.

This takes us well along the way to a solution of our problem. Where, for example, an employee of an independent contractor enters premises with express directions to repair defective wiring and in so doing sustains injuries from electric shock, it might be argued that he was not as a matter of law entitled to go to the jury, since he clearly knew of the existence of the defect, even if the defect was not "visible" or "obvious." *Nagle v. City of Long Beach* (supra) comes closest to this situation, although as indicated above the case rests on a dual holding. There the injured party was sent in to repair certain woodwork which had been for years under water. He was injured on a part thereof, a wooden ladder. But no California case holds that where the injured party is sent to repair or dismantle, he can under no circumstances, as a matter of law, recover for injury from a latent defect known to the owner-occupier.

When the injured party is sent on to the premises to do certain work, such as generally dismantle, it does not follow as a matter of law, that he knows, or that there will be obvious to him or that he will discover every defect. No California case goes that far.

The California Supreme Court cases of *Blumberg v. M. & T. Inc.* (supra), *Raber v. Tumin* (supra) and *Hinds v. Wheadon* (supra), in each of which a judgment of nonsuit was reversed, are persuasive as to the view of the Supreme Court that these owner-occupier cases generally present questions of fact. Particularly so is *Blumberg* (supra), where Mrs. Blumberg's high heel caught in an opening in a mat on which she was walking, resulting in a fall. The court

stated, "Moreover, whether the nature of the mat was obvious to Mrs. Blumberg was a question of fact for the determination of the jury," 34 Cal. 2d at 230.

This court in a diversity case is required to determine California law on our precise question. The Supreme Court of the United States, in *King v. Order of United Commercial Travelers etc.* [1948] 333 U.S. 153, 158, summarized the prior holdings of that court as follows:

> "federal courts are bound by decisions of a state's intermediate appellate courts unless there is persuasive evidence that the highest state court would rule otherwise. Six Companies v. Highway District, 311 U.S. 180 (1940); West v. American T. & T. Co., 311 U.S. 223 (1940); and Stoner v. New York Life Ins. Co., 311 U.S. 464 (1940)."[4]

We think there is persuasive evidence the California Supreme Court will not adopt the rule of the *Nagle* case. We do not find the "construction project" cases or the *Nagle* case even cited by the California Supreme Court. That court has held that only if the defect was obvious or one which the injured party "must" have known of, is there assumption of risk as a matter of law; only if the injured party "should or

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[4]On the question of ascertaining State law, see also:
35 *C.J.S.*, page 1256, Section 174
Seymour v. Union News Co., [7 Cir. 1954] 217 F.2d 168, 169
Cooper v. American Airlines, Inc., [2 Cir. 1945] 149 F.2d 355, 357-8
American Surety v. Bank of California, [D.C.Ore. 1941] 44 Fed. Supp. 81, 83; Aff. [9 Cir. 1943] in 133 F.2d 160
Princess Garment Co. v. Fireman's Fund Ins. Co., [6 Cir. 1940] 115 F.2d 380, 383
McCoy v. Province Journal Co., [1 Cir. 1951] 190 F.2d 760, 765
National Foam System Inc. v. Urquhart [3 Cir. 1953] 202 F.2d 659, 661
Teamsters Union v. Hanke, [1950] 339 U.S. 470
State of California v. Fred S. Renauld & Co., [9 Cir. 1950] 179 F.2d 605, 609
Lembcke v. United States [9 Cir. 1950] 181 F.2d 703, 707.

could have discovered the danger by the exercise of ordinary care," (*Prescott v. Ralphs Grocery Company*, supra; *Austin v. Riverside Portland Cement Company*, supra), when considered with the duty of the owner to provide a safe premises free from latent defects, and considered with the invitee's lack of duty to inspect for latent dangers, is there contributory negligence as a matter of law.

The effect of the District Court's order in granting the motion for directed verdict was to hold, as a matter of law, that appellants either *knew* of the defective center column or *must have known* of it; or to hold, that notwithstanding the fact that appellants were invitees, and under no duty to search for hidden dangers, that they should or could have discovered the hidden danger by the exercise of ordinary care.

Under the facts of this case, we think that these were questions of fact to go to the jury.[5]

The judgment is reversed and remanded.

(Endorsed:) Opinion. Filed June 20, 1956,

PAUL P. O'BRIEN, *Clerk.*

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[5]We have not considered cases from other jurisdictions. An annotation on the "Duty of owner of premises to furnish independent contractor or his employees a safe place to work, where contract is for repairs," appears in 31 A.L.R. 2d 1375.

Appendix B

Opinion of the District Court (R. 514-519).

The Court: Members of the Jury, the Court has been called upon to make a ruling in connection with a legal motion made in this case, and instead of making a ruling in the absence of the Jury, and then informing you about it, I thought it might be just as well to have the Jury here.

At the conclusion of the Plaintiff's case, the defendant moved for a directed verdict in favor of the defendant. The Court reserved ruling on the motion.

Now, the defendant's evidence having been presented, and in fact all of the evidence of both sides having been completed, defendant has renewed and re-urged a motion for directed verdict in its favor. The legal question presented is no different now than that tendered at the conclusion of plaintiff's case. The evidence introduced by the defendant does no more than strengthen the factual situation from which the legal question of liability flows.

Here California law prevails. The question of whether or not on the record the defendant has any liability, must be determined according to the State law. In this case, California law. There is no doubt that under California law, a legal duty generally rests upon the owner of the property in favor of business invitees, to use due care to protect the invitees against injury while on the owner's premises. The [598] plaintiffs' were such business invitees.

But the question here is whether under the circumstances of this case, California law imposes a liability upon the defendant. The plaintiffs were employees of an independent contractor with whom the defendant Shell contracted to tear down and rebuild a storage tank. Plaintiffs were specifically directed by the independent contractor, their employer, pursuant to written and oral instructions, to

dismantle the tank and as to the moving and scrapping of the parts thereof that were in bad condition, among which was the center pole, and then to rebuild the tank. The manner of doing the work is entirely within the control and direction of the contractor. There is no evidence that defendant had any knowledge of the precise manner in which the plaintiffs intended to or in fact did do the work of dismantling.

Plaintiffs were part of a labor group admittedly of long experience in the doing of this precise kind of work. It was the defective and bad condition of the center pole in the tank which was to be removed by the plaintiffs which contributed to their injuries. The contract between the defendant and the independent contractor specifically provided for the removal of the center pole and for its replacement. The independent contractor by written work order directed the plaintiffs, among other workmen involved, to remove the center pole and replace it. There is no dispute in [599] the testimony that the condition of the pole was defective and that the defendant was prompted thereby to contract for its removal and replacement. There is also no dispute in the testimony that the plaintiffs and other employees were advised that the pole was in bad condition. Thus it appears that the plaintiffs were skilled workmen employed to reconstruct equipment which was in bad condition.

As has been stated, referring to the Nagle case, the very nature of the employment was itself a warning of the dangers to be encountered. The evidence showed that there were other effective methods of doing the work than that employed at the time.

Under the circumstances, the general rule as to liability to business invitees under the Law of California is not applicable. Nagle against City of Long Beach, 113 Cal App

2d, 669, lays down the rule that the owner is not liable to employees of an independent contractor employed to repair and reconstruct a building or structure, for injuries incurred by reason of the condition of the parts to be repaired or rebuilt. It follows other decisions of California courts, among them Ambrose against Allen, 113 Cal App 107; Kolburn against P. J. Walker Co., 38 Cal App 2d, 545. The reason for the California rule is clearly cited in the decisions cited and need not be again repeated here.

It has been argued by the plaintiffs that rule established [600] by Nagle against City of Long Beach is not applicable where there is some latent or secret defect in a part of a structure known to the proprietor and not communicated to the contractor or his employees. However, there is no California law cited nor any logical reason advanced to support such contention. For here the generally defective or bad condition of the pole was known both to the contractor and to the plaintiffs, not only specifically, but because of the general nature of the work.

There might be cases in which a latent defect, even under the rule that is laid down in the Nagle case, might be a basis for liability on the part of the defendant as the owner of the property. For example, if there was communicated to the contractor by the owner that the top of the pole was defective and that the rest of the pole was in good condition, and that it thereafter developed that there was a serious defect at the bottom part of the pole which caused the damage, then there might be a case in which an exception might be made to the rule in the Nagle case. But there can be no question of latent defect at all in a case such as this, where the contractor or his employees knew that the equipment was in bad condition. Under those circumstances, knowing that the pole was in bad condition, they had the

means—that is, both the contractor and his employees had the means—of determining the proper and safe manner of proceeding with the [601] work.

The California cases cited by the plaintiffs are not applicable, for all of those cases concerned independent contractor employees who were injured on property of the owner, not a part of the condition which the contractor was employed to remedy. In such cases, the liability of the owner rested upon his general liability to keep his premises generally safe for business invitees.

I might add by way of dictum that it is true that the two plaintiffs who sit here in the courtroom have serious injuries which bespeak the sympathy and consideration of all those with whom they come in contact. But that, per se, does not warrant extending liability when it does not exist.

In view of the present state of the California law on the subject, by which we are bound in the Federal Court in diversity cases, it is clear from the evidence that was presented by the plaintiff as well as the whole state of the record, that no liability exists in law on the part of the defendant and hence, the defendant is entitled to a directed verdict in its favor. Consequently, the Court will direct the entry of an order for directed verdict in favor of the defendant in the case.

Appendix C

United States Court of Appeals
for the Ninth Circuit

JAMES P. SULLIVAN, *Appellant,* vs. SHELL OIL COMPANY, *Appellee.*	No. 14,570

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court, with costs in this court in favor of the appellant and against the appellee.

It is further ordered and adjudged by this Court that the appellant recover against the appellee for his costs herein expended and have execution therefor.

Filed and entered June 20, 1956.

Appendix C (Cont.)

United States Court of Appeals
for the Ninth Circuit

HERMAN R. ENGBERSON, *Appellant,*		
vs.		No. 14,571
SHELL OIL COMPANY, *Appellee.*		

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court, with costs in this court in favor of the appellant and against the appellee.

It is further ordered and adjudged by this Court that the appellant recover against the appellee for his costs herein expended and have execution therefor.

Filed and entered June 20, 1956.

Appendix D

Nagle v. City of Long Beach, 113 Cal. App. 2d 669, 248 P.2d 536 (District Court of Appeal of the State of California, Second District, Division Two, 1952)

OPINION

Appeal from a judgment entered after granting a motion for nonsuit in an action by an employee of the contractor for alleged negligence of the city in the maintenance of the facilities used for entering and leaving a gas holder. In ascending from the bottom of the tank's interior, a crossbar near the top of the ladder he was climbing gave way and he fell to the bottom, causing serious injuries.

Respondent contracted with a construction company to repair its gas holder, a reservoir for storing gas for domestic consumption. Appellant was an employee of the contractor engaged to make such repairs. The reservoir's lower portion is a large immobile stationary steel tank 45 feet in height. Its upper portion contracts and expands after the fashion of a small telescope to accommodate its capacity to the amount and pressure of the gas stored. Within the lower part is a wooden structure made of uprights, extending vertically the entire 45 feet with their necessary braces. Upon such wooden structure, the upper, expansive part of the tank rests when not lifted by the gas. The tank was built about 1927. Minor repairs were done in 1933 and in 1947. The construction company which employed appellant performed its contract in 1948. Throughout the years of its service the tank contained water 35 feet in depth which covered the wooden structure. When the construction company commenced its operations, it opened the top of the reservoir to permit entrance into and exit from the interior.

This was accomplished by removing a steel plate at the top. Then a ladder 4 feet in width was constructed by the contractor inside the tank extending from the floor to the opening. It was made of wooden crossbars fastened to three vertical uprights of 2 x 4 timbers set in a stationary position.

But there was another ladder already in the tank at the time of the commencement of repairs for the use of the workmen. It is referred to as a "chicken ladder." It consisted of crossbars 1″ x 4″ x 20″ nailed to a single timber. It extended directly to an aperture at the top. The crossbars had been nailed to the ascending timber at the time the tank was first constructed and through the years had remained there partially submerged in water. The chicken ladder was more than 75 feet from the 4-foot ladder. Because the latter was covered with grease and muck from the boots of the men who climbed it, the chicken ladder was used by many of the men for ascending to the top of the reservoir.

When appellant entered the tank on August 3, 1948, he used the 4-foot ladder, and again on leaving. He entered by the same on the following day but when appellant with his 210 pounds tried to make his exit he resorted to the chicken ladder. He faced the ascending timber as he progressed upwards and could see the union of the crossbars and the column all the way but found no defect. Also, three other craftsmen who had used that ladder observed no defect and they had seen other employees use it. Appellant chose to use it because (1) it was near the spot where he ended the day's work, (2) the grease on his employer's 4-foot ladder was excessive, (3) a fellow-workman suggested their using the chicken ladder, and (4) no signs told him not to use it. His immediate duties in the tank were to assist in strengthening the interior wooden framework with new bracing and nailing.

In support of his demand for a reversal, appellant invokes the familiar rules applicable to the review by an appellate tribunal of judgment following a nonsuit as well as of the duty of an owner of property to exercise ordinary care to keep his premises reasonably safe and to warn an invitee of any hidden dangers or defective conditions thereon.

His doctrines are sound but their application to the instant factual situation is not justified. He adopts the argument of the plaintiff in *Ambrose v. Allen*, 113 Cal. App. 107 [289 P. 169]. Ambrose was a visitor to defendant's structure which was undergoing repairs. He stepped on a joist that gave way as a result of percolating water, dust and age. The court opined (page 113) that "negligence is not absolute, but is a relative matter, depending upon time, place, persons, and circumstances . . . The fact that the building and the stairway were evidently in process of construction charges those concerned in its construction with a very different degree of care from that which attaches to the owner of a completed building . . ." The authorities cited in the opinion are pertinent and illuminating. It is an established rule that an invitee to an incompleted building in process of construction is invited to use such building in its condition then existing. (*Kolburn v. P. J. Walker Co.*, 38 Cal. App. 2d 545, 549 [101 P.2d 747].) The same rule should apply to a building undergoing repairs. In *King v. Griffith Co.*, 65 Cal. App. 2d 114, 116 [150 P.2d 8], the plaintiff learned the same to his chagrin that if the dangerous condition of the premises is obvious, the "owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses." See, also, *Clyde v. Mitchell*, 14 Cal. App. 2d 365 [58 P.2d 205].

The doctrine announced in those decisions is especially applicable here. Appellant was upon respondent's property as part of a labor group specifically brought there for the purpose of strengthening and refurbishing a wooden structure within the gas reservoir. He was a skilled craftsman employed to assist in remedying the grossly defective conditions which contributed to his injuries. The very nature of his employment was itself warning of the dangers to be encountered. Moreover, his own weight was a suggestion that he be cautious in climbing on any old structure especially one that had been under water for 25 years. The record contains no specific evidence as to the nature of the alleged defective condition of the ladder and why it gave way under appellant's weight. Although appellant testified that a rung gave way, it was not shown that this occurred because of rotting wood or rusted nails; nor does the proof show whether the rung broke or the nails pulled loose. In the absence of such evidence it might well have been that a thorough scrutiny by respondent would have failed to reveal any defective conditions. Where such proof is lacking, there can be no finding that a reasonable inspection by respondent would have discovered the alleged danger. It follows that the motion for nonsuit was properly granted. (*Trembley v. Capitol Co.*, 89 Cal. App. 2d 606, 609 [201 P.2d 398].)

Judgment affirmed.

MOORE, P.J.

McCOMB, J., and FOX, J., concurred.

Appendix E

Excerpt from *McDonald v. Shell Oil Co.*, 44 Cal. 2d 785, 798, 285 P.2d 902.

Various factual situations in which an owner may be liable for injuries to the employee of the independent contractor should be distinguished: (1) This is not a case where the employee of the independent contractor was injured by some condition of the owner's premises over which the owner remained in control, and where the owner's duties to the employee were those owing to a business invitee (*Austin v. Riverside Portland Cement Co., ante*, p. 225 [282 P.2d 69]; *La Malfa v. Piombo Bros.*, 70 Cal.App.2d 840 [161 P.2d 964]; *Bondini v. Amship Corp.*, 81 Cal.App.2d 751 [185 P.2d 94]; *Oldham v. Atchison, T. & S. F. Ry. Co.*, 85 Cal. App. 2d 214 [192 P.2d 516]; (2) Nor is this a case where the owner furnished the equipment or was obligated by contract to do so, and the equipment proved to be defective, causing injury to the employee of the independent contractor (*Moran v. Zenith Oil Co.*, 92 Cal.App.2d 236 [206 P.2d 679]; *Martin v. Food Machinery Corp.*, 100 Cal.App.2d 244 [223 P.2d 293]); (3) Finally, this is not a case where the owner actively interfered with or arbitrarily assumed to direct the employees of the independent contractor as to the manner and method of performing the work. (*Majors v. Connor*, 162 Cal. 131 [121 P. 371]; see anno.: 44 A.L.R. 932.) Likewise distinguishable is *Snow v. Marian Realty Co.*, 212 Cal. 622 [299 P. 720], where the owner's liability for damages stemmed not from responsibility for the negligent acts of the independent contractors but from the allowance of work on its property constituting a nuisance.

Appendix F

Hammond v. El Dorado Springs, 362 Mo. 530, 242 S.W. 2d 449, 31 A.L.R. 2d 1364 (Supreme Court of Missouri, 1951).

OPINION

The appellant as plaintiff brought suit against the City of El Dorado Springs seeking to recover for personal injuries sustained in a fall from a water tower owned and operated by the respondent city. The respondent city filed its motion to dismiss for failure to state a cause of action. At the same time the city, by leave of court, filed its third-party petition against respondent National Tank Maintenance Corporation. The latter likewise filed motion to dismiss. The trial court sustained the motion to dismiss as to the city and the plaintiff refusing to plead further, dismissed the action. The plaintiff in due time, perfected his appeal from this ruling to this court.

The motion to dismiss filed by the National Tank Maintenance Corporation is still pending in the trial court pending this appeal. Although the transcript on appeal contains the petition filed against this third party defendant, neither that petition nor the contract between the third party defendant and the city attached thereto are before this court and all consideration thereof has been excluded in considering this opinion.

The sole question before this court is whether appellant states facts sufficient to constitute a cause of action.

After properly describing both the plaintiff, the defendant city, and alleging statutory notice to the city of plaintiff's claim, the petition alleges:

A. That the city for many years owned, operated, maintained, supervised and controlled a city water system sup-

plying water to its residents at a profit and as a business venture.

B. That as *"an integral part of"* the system was a water tower of great height, constructed and maintained by the city and under its exclusive control and supervision.

C. That on the 29th of May, 1949, plaintiff was employed by the National Tank Maintenance Corporation; *"that under the direction of plaintiff's employer,"* and by invitation of the defendant city, plaintiff was lawfully upon the water tower, working inside thereof *"in performance of the business of defendant in repairing, altering and improving said elevated water tower pursuant to a certain contract of employment entered into by and between defendant and plaintiff's said employer, an independent contractor."*

D. That while plaintiff was working inside the bowl of the tower, he was suspended in the air on a rope sling attached to a long board which rested upon iron rods three-eighths (⅜ in.) in diameter commonly referred to as "spider rods"; *"that said spider rods were and are an integral part and portion of said water tower maintained and controlled by defendant";* that while plaintiff was so suspended, *"and in the only manner which plaintiff could perform the alterations, repairs and improvements for defendant, as defendant well knew or should have known,"* the rods broke, bent, loosened and unfastened causing plaintiff to fall and be injured.

E. That defendant city was negligent as follows:

(1) Failed to warn plaintiff of a dangerous condition existing in and on the premises at a time when defendant could and should have anticipated injury to the plaintiff because of such condition.

(2) Defendant knew or should have known that the spider rods were rusted, corroded and structurally defective and

that plaintiff could not perceive such dangerous condition himself.

(3) Defendant negligently installed or had installed said spider rods many years before, well knowing they had not been preserved against deterioration by water or humidity thereby creating a hazardous and dangerous condition of which condition defendant failed to warn the plaintiff.

(4) Defendant had knowledge, real or constructive, of the dangerous manner in which plaintiff was required to perform his work; had knowledge of the latent defect in the rods not visible to human eye and defendant failed to warn of the latent defective dangerous condition.

F. Plaintiff then alleges the injuries sustained which, if true, are extremely severe and permanent.

In determining the sufficiency of the petition this court must indulge every reasonable intendment in favor of the petition. Stephens v. Kansas City Gas Company, 354 Mo. 835, 191 SW2d 601 and cases therein cited. However, this court may also take into consideration ultimate facts which may be inferred from the facts well pleaded, as well as all inferences as logically flow from such pleaded facts. Welch v. Thompson, 357 Mo. 703, 210 SW2d 79 and Therrien v. Mercantile-Commerce Bank and Trust Company, 360 Mo. 149, 227 SW2d 708.

Certain ultimate facts and logical inferences can be drawn from the facts alleged in this petition. (1) The plaintiff's employer was an independent contractor in the strict meaning of that term. The city had no control over the manner or method of doing the work contracted for nor did it have any control over the plaintiff himself or his methods used in carrying out the work. (2) The contractor, plaintiff's employer, contracted to "*repair, alter and improve*" the water tower upon which the plaintiff was working for his

employer. (3) The spider rods which broke or failed are an integral part of the tank, therefore, plaintiff's employer was required under his contract to "*repair, alter and improve*" the spider rods along the remainder of the tank. (4) The repairs, alterations and improvements necessary to be made were the responsibility of the contractor, the city was merely to receive a completely repaired, altered and improved tank.

To repair a structure or thing presupposes that it is defective in some respect, otherwise there would be no necessity to repair, alter or improve. This court in the case of Meyer v. Wells Realty & Investment Co., 292 SW 17, 19, held that where an employee fell from a defective scaffold furnished by his employer in violation of a statute requiring a scaffold to insure safety of those using same while "*repairing*" a building, he could not recover when it was shown employee was merely washing walls when he fell. The court cited with approval an Iowa case, Woodbury Company v. Wm. Tackaberry Co., 166 Iowa 642, 148 NW 639, the opinion of which quoted an English case as follows:

"Repair always involves renewal; renewal of a part; of a subordinate part. A skylight leaks; repair is effected by hacking out the putties, putting in new ones, and renewing the paint. A roof falls out of repair; the necessary work is to replace the decaying timbers by sound wood; to substitute sound tiles or slates for those which are cracked, broken, or missing; to make good the flashings and the like. Part of a garden wall falls down; repair is effected by building it up again with new mortar, and, so far as necessary, new bricks and stone. Repair is restoration by renewal or replacement of subsidiary parts of a whole."

In the case of Heart of America Lumber Co. v. Belove, DC, 28 F Supp 619, 620, Judge Merrill Otis for the Western District of Missouri states that an agreement to repair is an

agreement to restore a thing to a sound or good state after decay, injury, dilapidation, or partial destruction. To the same effect is the case of Miller Hatcheries v. Buckeye Incubator Co. 8 Cir, 41 F2d 619. The word repair contemplates an existing structure or thing which has become imperfect by reason of the elements or otherwise, and to repair we restore or supply in the original structure that which is lost, destroyed or missing. Fuche v. City of Cedar Rapids, 158 Iowa 392, 139 NW 903, 44 LRA NS 590.

As heretofore pointed out the employer of the appellant-plaintiff contracted to repair this water tower. This necessarily included the repair of the spider rods since they were an *"integral"* part of and a subsidiary part of the whole tower. Nowhere in the petition is there an allegation or a logical inference that either the contractor or his employee was incompetent, inexperienced or incapable of doing the work contracted to be done. It must, therefore, be inferred that the contractor was competent and capable of making the repairs needed on the tower and its integral parts. It must also be inferred that the repairs contemplated were general repairs as distinguished from specific or designated repairs.

Before repairs of any kind can be made to a thing, it is first necessary to find out what is wrong with it. In other words, an inspection must be made of the thing to be repaired before any work is commenced, otherwise no repairs could ever be effected. Where one is engaged to repair something it necessarily implies that some defect exists. It is then the responsibility of the repairman to determine what that defect is. It does not follow that the person having the repairs made need inform the repairman what repairs are necessary unless he desires only one specific repair made. It is for this reason that we have

experts or specialists in practically every field of endeavor, to tell us what is wrong and then remedy the defect.

The city may or may not have known what was wrong with the water tower or any part of it. In effect the city said to the contractor, "We have a tank which needs repairs, go fix it for us, do whatever is necessary to put it in good condition." Upon the acceptance of such a contract the contractor accepted the responsibility of determining what needed repairing, what was necessary to repair and to then complete the repairs. He may be said to have assumed the risks involved in placing the tank in good condition. In such a situation it was the duty of the contractor to discover any latent or concealed defects by proper tests and inspections and after ascertaining their existence, give his employee warning thereof. Batton v. Atlantic Coast Line R. Co. 212 NC 256, 193 SE 674; certiorari denied, Atlantic Coast Line R. Co. v. Batton, 303 US 651, 58 S Ct 750, 82 L Ed 1112.

In the case of Marsanick v. Luechtefeld, Mo App, 157 SW2d 537, an employer directed his employee to wash a brick wall with muriatic acid without warning him of the danger thereof. The St. Louis Court of Appeals in the opinion stated the rule of law that an employer is under obligation to inform himself of those matters of scientific knowledge possessed by men of general education relative to dangers and hazards involved in the use of substances and processes used in his employment, and to acquaint his employee with those dangers to which in their ignorance the employee might otherwise be subject. (Citing cases and texts.) The same rule might be applied here. The contractor being a competent person to repair water tanks must inform himself of the dangers likely to be present in prosecuting the work and so inform his employees. The petition alleges in substance that the spider rods were rusted, corroded,

and structurally defective; that they had not been preserved against deterioration by water and humidity; and that they contained a latent defect not visible to the human eye. The contractor, under his contract to repair had the duty of discovering such defects if they existed and repair them. If he failed to do so he not only failed to fulfill his contract but failed to perform his duty to his employee. The contractor had an equal or even a better opportunity to discover any defects than did the city.

* * * * *

A case more closely in point than any cited by the parties is that of Kowalsky v. Conreco Co., Inc. 264 NY 125, 190 NE 206, decided by the New York Court of Appeals. Plaintiff was the widow of the employee of an independent contractor. The contractor's work consisted of repairing iron window shutters, the hooks and the bars used to shut them, and the hinges. During the course of the work and before it was completed, the contractor sent deceased to replace a glass window pane which had been knocked out by other employees. In replacing the glass the deceased leaned against or took hold of one of the shutter bars which gave away causing plaintiff to fall to his death. The court held (1) the contractor had been hired to make the repairs, to remove the danger, and to secure the bars and shutters, (2) no responsibility rests upon the owner of real property to one hurt through a dangerous condition he has undertaken to fix, (3) an employee cannot recover for injuries received while doing an act to eliminate the cause of the injury.

The general rule as to the liability of an owner to an independent contractor and his employees as stated by our appellate courts is the law. However, we hold that there is an exception to that rule, to-wit: An owner or contractee

is not liable for injuries to, or death of, an employee of an independent contractor or the contractor himself on the ground that he furnished such employee or contractor an unsafe place to work where the employee or contractor was injured or killed because of conditions he was correcting or repairing under a contract to repair.

Since the petition before us clearly brings the case within the exception stated, the action of the trial court in sustaining the motion to dismiss of respondent city is affirmed.

* * * * *

OLIVER, Sp. J

All concur.

FILED
OCT 22 1956
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 448

SHELL OIL COMPANY,
Petitioner,
vs.
JAMES P. SULLIVAN and HERMAN R. ENGBERSON,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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STATEMENT OF THE CASE.

The best statement of the case is found in the opinion of the Court of Appeals. (Pet. Br. App. A, pp. 2-7.) This statement differs materially from the statement made by the petitioner. (Pet. Br. pp. 3-6.) The real facts are that petitioner owned a tank which it wanted *dismantled.* It did not want the tank *repaired.* It engaged respondents' employer to *dismantle,* not to *repair* the tank. Petitioner knew that

the center post would be used by the workmen as a supporting member, and that it was inadequate for that purpose. Although petitioner knew this, it failed to furnish that information to the respondents, and failed to warn respondents that there was any danger or defect. The defect was one which could not have been ascertained by any inspection which respondents were equipped to make. Special tools were required to reveal the defect. Assuming, because they were not warned to the contrary, that there was no defect, the respondents proceeded to *dismantle,* not to *repair,* the tank in the usual manner, and, while doing so, were injured as a result of the defect, known to the petitioner but unknown to respondents.

Although there was evidence in the record from which the jury could have so found, the trial judge took the case from the jury. All that the Court of Appeals decided was that under these circumstances it was error for the trial Court to have done so.

THE QUESTION OF LAW TO BE REVIEWED.

As the Court of Appeals pointed out, the California Courts have steadfastly held that the issues of negligence and contributory negligence are questions of fact to be determined by the jury, not questions of law to be determined by the Court. The authorities need not be set forth here, because reference is made to them in the opinion of the Court of Appeals.

Petitioner contends that a decision of a California District Court of Appeal in *Nagle v. City of Long*

Beach, 113 Cal. App. (2d) 669, 248 P. (2d) 536, completely changes the California rule. That decision has been completely ignored by the California Supreme Court in later opinions which restate the rule which petitioner contends the decision changes. As the Court of Appeals pointed out (Pet. Br. App. A, p. 7, 12-16) all the *Nagle* case (*supra*) holds is that *if* an invitee comes on the premises for the purpose of *repairing* a specific defective structure, *and* he is injured through an *unexplained defect* in the structure, he cannot recover from the owner because the knowledge that he is to *repair* is itself notice of the defect, *unless* proof is offered that the defect is one not to be anticipated *and* against which the invitee could not guard himself.

Tersely put, the question of law which this Court is asked to review is, What is the significance of the *Nagle* case (*supra*) in the negligence law of California?

THE QUESTION IS UNIMPORTANT.

Although, as the Court of Appeals points out, (Pet. Br. App. A, pp. 15-16) the California Supreme Court has seen fit to ignore the *Nagle* case, apparently because it is of little, if any, consequence in the California negligence law, petitioners ask this Court to take up its valuable time to interpret that which the California Supreme Court deems of such insignificance as to ignore completely. The real question here is whether the case and the *Nagle* case (*supra*) can even

be compared on their facts; whether the *Nagle* case (*supra*) even applies. The Court of Appeals held it did not. And the decision of the Court of Appeals, rather than deciding what the California law is, or would be if the California Court were asked to decide it, merely holds that the *Nagle* case is inapplicable to these facts.

The question *of law* does not seem to be of sufficient importance for this Court to spend further time.

NAGLE v. CITY OF LONG BEACH IS INAPPLICABLE.

The only reason the *Nagle* case (*supra*) even appears to be applicable is because of the distorted statement of the case which petitioner presents. In the *Nagle* case (*supra*) the invitee was on the premises for the specific purpose of *repairing* the ladder which broke. No evidence was offered as to the nature of the defect which caused the break.

Quite the contrary is true here. Although petitioner repeatedly describes the purpose of the invitation to respondents to have been, "to *remedy* a defective condition" (Pet. Br. p. 2), "dismantling and *replacing*" (Pet. Br. p. 3), "scrapped and *replaced*" (Pet. Br. p. 3), "dismantling and *repairing*" (Pet. Br. p. 4), "they were to *repair*" (Pet. Br. p. 4), "dismantle, scrap and *repair*" (Pet. Br. p. 6), "engaged in *repairing* it" (Pet. Br. p. 6), "dismantling and *repairing* crew" (Pet. Br. p. 7), "which they were hired to *repair*" (Pet. Br. p. 7), "which he was employed to *repair*" (Pet. Br. p. 9), "the dismantling

and *repairing"* (Pet. Br. p. 10), "which it was his job to *remedy"* (Pet. Br. p. 10), petitioner's promiscuous misuse of the term "repair" is not going to change the facts of the case. Actually, respondents were not invited on the property to "repair", or to "replace", or to "remedy" anything. Their sole purpose was to dismantle.

> "This appeal raises the question of the duty of an owner occupier of premises to the employees of an independent contractor engaged in *dismantling* a tank on the premises". (Italics ours for emphasis.) (Opinion of Court of Appeals (Pet. Br. App. A, p. 1).)

> "Shell would have us go a step further, and, based on Nagle v. City of Long Beach (supra), hold that California law provides that employees of an independent contractor such as Sullivan and Engberson, sent upon the premises to *dismantle* a tank, were *as a matter of law* not entitled to recover for injuries resulting from the defective center column." (Opinion of the Court of Appeals (Pet. Br. App. A, p. 13).)

After the Court of Appeals pointed out that the *Nagle* case (*supra*) was a "repair" case, as well as resting "on a dual holding", that Court continues

> "When the injured party is sent on to the premises to do certain work, such as generally *dismantle,* it does not follow as a matter of law, that he knows, or that there will be obvious to him or that he will discover every defect. No California case goes that far." (Italics ours for emphasis.) (Opinion of the Court of Appeals (Pet. Br. App. A, p. 14).)

All this Court could accomplish by issuing a writ of certiorari in this matter is to discover that the Court of Appeals has correctly applied the California law to the case which was before it, and that it reversed the judgment of the trial Court because that judgment was not supported by any California precedent. The *Nagle* case (*supra*) might throw some light upon the rights of the parties if the facts were as the petitioner presents them. But as the Court of Appeals pointed out, this was not a case of respondents being invited on the premises to *repair* or *replace* a defective center column, and having been injured as a result of some unestablished defect which was unknown to either party. Rather it is a case where the invitee was there to *dismantle,* which he proceeded to do in the manner in which the owner-occupier knew he would proceed. The owner-occupier knew of the defect, it was fully identified, no warning was given to the invitee and he could not have discovered, and did not discover, the defect with any means available to him. Why should a verdict have been directed for the owner-occupier?

Dated, October 19, 1956.

Respectfully submitted,

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FRANCIS T. CORNISH,
Of Counsel.